



Plaintiff, the State of Oklahoma ("the State"), respectfully submits this reply in further support of its "Motion *in Limine* to Preclude Certain Argument, Questioning or Introduction of 'Evidence' by Defendants Pertaining to the State's Regulation of Poultry Waste." [DKT #2422]

**A. Defendants mischaracterize the relief sought by the State's Motion**

Defendants mischaracterize the relief sought by the State's Motion. Defendants assert that the State's Motion "seeks, in effect, to exclude any argument, testimony or evidence concerning the scope, purpose or effect of Oklahoma's comprehensive poultry litter laws and regulations, or the Animal Waste Management Plans ('AWMP') promulgated pursuant to them." *See* Response, p. 1. This is incorrect. What the State seeks to exclude are Defendants' incorrect characterizations of the State's laws and regulations. Specifically, the State seeks to preclude Defendants from making incorrect assertions, *inter alia*, that an AWMP is a permit to land-apply poultry waste, that an AWMP permits or authorizes any particular instance of land application of poultry waste in the Illinois River Watershed ("IRW"), that compliance with portions of an AWMP pertaining to land application rates equates to full compliance with the other provisions of Oklahoma law applicable to land application of poultry waste, such as the required criteria for following best management practices, or that the State promotes the land application of poultry waste in the IRW. *See* Motion, p. 1. Because such assertions are legally and factually incorrect, they are irrelevant. Moreover, making such legally and factually incorrect assertions would confuse the issues and would be highly prejudicial to the State.<sup>1</sup>

**B. As a matter of law, an AWMP is not a permit or authorization to land apply poultry waste generally, or a permit or authorization for any specific land application rate or instance of poultry waste**

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<sup>1</sup> Defendants also erroneously assert that this Court "concluded during the recent summary judgment hearings [that] Arkansas statutory and common law applies to allegations concerning conduct in Arkansas." *See* Response, p. 1 n.1. It did not.

As detailed in the State's Motion, the Oklahoma Registered Poultry Feeding Operations Act ("ORPFOA") requires that registered poultry feeding operations utilize best management practices and meet the conditions and requirements of Title 2, Section 10-9.7(B). *See* 2 Okla. Stat. § 10-9.7. Title 2, Section 10-9.7(B) provides that poultry feeding operations are required to meet, without limitation, the following best management practice criteria: that "[p]oultry waste handling, treatment, management and removal shall[] not create an environmental or a public health hazard, [and] not result in the contamination of waters of the state . . . ." *See* 2 Okla. Stat. § 10-9.7(B)(4)(a) & (B)(4)(b). In addition to meeting this criteria, 2 Okla. Stat. § 10-9.7(C) requires that poultry feeding operations obtain an AWMP.

Defendants argue that AWMPs constitute the entire universe of requirements that must be complied with. This myopic view advanced by Defendants is (1) not supported by the plain language of 2 Okla. Stat. § 10-9.7, (2) at odds with the view of the agency charged with enforcing 2 Okla. Stat. § 10-9.7, and (3) at odds with the language of the AWMPs relied upon by Defendants in their Response.

Defendants read 2 Okla. Stat. § 10-9.7 as if it contained subsection (C) alone, and no other subsections. Indeed, Defendants would read subsections (A) and (B) completely out of the statute. That is an improper method of statutory construction. *See, e.g., Oklahoma Tax Com. v. City Vending of Muskogee, Inc.*, 1992 Okla. LEXIS 158, at \*52-53 (Okla. June 14, 1992) ("Statutes must be construed as a consistent whole in harmony with logic, and every portion or part of a statute should be given effect if possible. We presume that the Legislature does not act in vain"). 2 Okla. Stat. § 10-9.7(A) requires that "[a]ll poultry operations shall utilize Best Management Practices and shall meet the conditions and requirements established by subsection B of this section and by rules promulgated by the State Board of Agriculture pursuant to the

Oklahoma Registered Poultry Feeding Operations Act." (Emphasis added.) 2 Okla. Stat. § 10-9.7(B) sets forth the required criteria for best management practices. As noted above, these criteria require that "[p]oultry waste handling, treatment, management and removal shall[] not create an environmental or a public health hazard, [and] not result in the contamination of waters of the state . . . ." *See* 2 Okla. Stat. § 10-9.7(B)(4)(a) & (B)(4)(b). In addition to being spelled out in the ORPFOA, these "no hazard / no contamination" requirements are also part of the accompanying Oklahoma Administrative Code regulations. *See* Okla. Admin. Code § 35:17-5-1 ("These rules are promulgated pursuant to and are read in conjunction with the Oklahoma Registered Poultry Feeding Operations Act found at Section 10-9.1 et seq. at Title 2 of the Oklahoma Statutes. The provisions of the Oklahoma Registered Poultry Feeding Operations Act are incorporated by reference") (emphasis added). Best management practices, including the "no hazard / no contamination" best management practices requirements found in 2 Okla. Stat. § 10-9.7(B)(4), are the yardstick against which the legality of poultry waste land application is to be measured.

The fact is, possession of an AWMP is only one element of the requirements set forth in 2 Okla. Stat. § 10-9.7, and compliance with the guidelines concerning land application rates and the like found in an AWMP does not equate to full compliance with Oklahoma law applicable to land application of poultry waste. This is a point that was made time and time again by ODAFF deponents charged with implementing the ORPFOA in response to Defendants' questioning on the topic. *See, e.g.*, DKT #2081-9 (1/14/08 Parrish Depo., 140:16-17) (Director of the Agricultural Environmental Management Services testifying that "[t]here are more regulations than just the plan"); DKT #2081-9 (1/14/08 Parrish Depo., 152:24-153:1) ("I can give you a whole list of things that they have to -- in addition to [following the waste management plan] that

they have to adhere to . . ."); DKT #2081-9 (1/14/08 Parrish Depo., 152:1-4) ("These plans provide guidance of how they should use their poultry waste, and then there are other guidance they should also refer to besides these plans"); DKT #2081-8 (8/27/08 Gunter Depo., 176:7-10) (Deputy General Counsel at ODAFF testifying that "[t]he animal waste management plan is one piece of the statutory requirements . . ."); DKT #2081-8 (8/27/08 Gunter Depo., 175:23-176:2); *see also* DKT #2081-11 (4/9/09 Strong Depo., 220:4-9) (current Secretary of the Environment testifying that "[i]t is possible to violate the laws of the state while complying with a nutrient management plan").

Moreover, contrary to Defendants' assertions, an AWMP plan is neither a permit or authorization to land apply poultry waste generally, nor a permit or authorization for any specific land application rate or instance of poultry waste. *See, e.g.*, DKT #2081-10 (4/13/09 Tolbert Depo., 222:14-17) (former Oklahoma Secretary of the Environment testifying that: ". . . I think there's no permit that's issued in the poultry context. So I don't know that you could say [land application of poultry waste in the IRW] is somehow expressly allowed"); DKT #2081-11 (4/9/09 Strong Depo., 245:14-22) (testifying that he does not believe that an animal waste management plan constitutes permission to apply a certain amount of phosphorus into the environment within the State of Oklahoma); DKT #2081-8 (8/27/08 Gunter Depo., 177:6-7) ("the waste management plan is a ceiling in many cases"). An AWMP simply contains guidance for managing poultry waste and requires compliance with all State law, including mandatory best management practices criteria. *See* DKT #2081-8 (8/27/08 Gunter Depo., 179:3-14) ("[An AWMP] is not rote, thou shalt do this, that shalt do this and you'll never have a problem. A plan is just exactly what it says. It's a plan. Here's guidelines. Here's things you need to take into consideration. . ."); Ex. 1 (8/2/07 Littlefield Depo., 107:1-5) (contract poultry inspector for

ODAFF testifying that "I wouldn't say that [following an AWMP] protects [the natural resources of the State]. I think that is a source is designed to protect. I -- I like the wording designed. I think that yes, it will help, but I don't think it's the whole -- the whole answer").

Defendants' assertion that the contents of AWMPs pertaining to land application rates constitute the entirety of best management practices with which a registrant must comply is belied by the specific AWMPs they themselves cite in their Response. *See* Response, p. 4 (citing to DKT #2057, Exs. 21-25). Each of these AWMPs also includes the following explicit waste utilization guideline: "All waste will be applied in accordance with all state and local laws and ordinances." *See* DKT #2057 (Exs. 21-25) (emphasis added). That is to say, in order to comply with Oklahoma law, not only must the registrant comply with the guidelines concerning land application rates and the like contained in its AWMP, but also all other best management practices criteria and other applicable laws.

Defendants' assertion that the contents of AWMPs somehow preempt other environmental laws is likewise a non-starter. *See* Response, p. 7. First, Defendants' assertion is founded on the premise that an AWMP is a permit or authorization, which as demonstrated in the State's Motion and above is incorrect as a matter of law. Second, it ignores the fact that AWMPs, as reflected by the very AWMPs Defendants cited to the Court, contain the instruction that "[a]ll waste will be applied in accordance with all state and local laws and ordinances." *See* DKT #2057 (Exs. 21-25). Third, it ignores the fact that the criteria of the ORPFOA best management practices are in complete harmony with other Oklahoma laws; there is no conflict between the ORPFOA and, for example, the Environmental Quality Code. *Compare, e.g.,* 2 Okla. Stat. § 10-9.7(B)(4)(a) & (B)(4)(b) *with* 27A Okla. Stat. § 2-6-105(A). And fourth, Oklahoma law specifically provides that all of its environmental laws are to be given full force

and effect. *See, e.g.*, 27 Okla. Stat. § 2-6-104 ("It is the purpose of this article to provide additional and cumulative remedies to prevent, abate and control the pollution of the waters of the state"). Defendants' entire argument on this point hinges on a thoroughly inapposite NPDES permitting case which expressly authorized a point source discharge of a pollutant. *See Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 870 (9th Cir. 2001). In contrast to a NPDES permit, nothing in an AWMP authorizes, let alone expressly authorizes, releases of pollutants from land applied poultry waste. In fact, AWMPs prohibit releases of pollutants from land applied poultry waste.

Contrary to Defendants' assertion, the State is not "at war with itself." *See* Response, p. 8. As demonstrated above, ODAFF's interpretation of the ORPFOA and the nature of AWMPs is entirely consistent with the State's position in this lawsuit. Defendants' efforts to suggest to the trier of fact that an AWMP is a permit or authorization to land apply poultry waste generally, or a permit or authorization for any specific land application rate or instance of poultry waste, or that compliance with those portions of an AWMP pertaining to land application rates equates to full compliance with Oklahoma laws applicable to the land application of poultry waste, are, as demonstrated above, incorrect. Therefore, such suggestions should be precluded under Fed. R. Evid. 402 and 403.

**C. As a matter of law, the State does not promote the land application of poultry waste in the IRW**

With respect to the State's request to exclude argument or "evidence" that the State promotes the land application of poultry waste in the IRW, the most Defendants can muster in their Response are the assertions that (1) the State has educated people with respect to poultry waste application in the IRW, (2) the State has itself applied poultry waste in the IRW, and (3) the State maintains a poultry waste marketplace. *See* Response, p. 2 n.3. With respect to the

first point, that the State has educated people with respect to poultry waste application in the IRW does not equate to promoting the use of poultry waste in the IRW. Quite the contrary. The existence of such educational programs are, as explained by the Oklahoma Legislature, "imperative for the protection of the public health and safety of the citizens of this state" "[b]ecause of the potential threat of water contamination." *See* 2 Okla. Stat. § 10-9.22(A)(2).

With respect to the second point, a review of the evidence cited by Defendants reveals that the State has land applied poultry waste for "educational and scientific purposes at demonstration sites in the Watershed," *see* DKT #2069 (Ex. 42), and on one occasion in the 1980s<sup>2</sup> when Ed Fite applied it to flower beds at the Scenic Rivers Commission headquarters building, *see* DKT #2069 (Ex. 43). These activities hardly constitute promotion of land application of poultry waste in the IRW.

And with respect to the third point, Defendants misconstrue the purpose of the poultry waste transfer program. The program was created in response to the Oklahoma Legislature's directive to ODAFF to "develop a plan to encourage the transfer of poultry waste out of designated nutrient-limited watersheds and nutrient-vulnerable groundwater as designated by the most recent Oklahoma's Water Quality Standards." *See* 2 Okla. Stat. § 10-9.13(B) (emphasis added); *see also* 2 Okla. Stat. § 10-9.13(A). The program in no way whatsoever encourages the land application of poultry waste in the IRW.

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<sup>2</sup> It should be remembered that much of Defendants' conduct well predates the enactment of the ORPFOA. Poultry waste generated by Defendants' birds in the Illinois River Watershed prior to the enactment of the ORPFOA is still causing injury and threatened injury today. *See* DKT #2062 (Fact ¶ 48, Ex. 107) (Phillips 12/19/07 Aff., ¶ 10) ("[T]he phosphorus affecting water quality problems in the river today may have been land applied two weeks ago or twenty years ago. . . . "[I]t is clear that the past application of poultry waste to soils in the watershed has contributed to the historical water quality problems in the watershed. Moreover, these historical applications are also contributing to the current and ongoing degradation in these systems").



As the foregoing makes clear, the State does not promote the land application of poultry waste in the IRW. Such suggestions should be precluded under Fed. R. Evid. 402 and 403.

**D. Defendants' Response highlights the prejudice that will occur if the State's Motion is not granted**

Defendants' arguments with respect to the State's various causes of action demonstrate the extraordinary confusion and prejudice that would result if Defendants' legally-unfounded and irrelevant assertion that AWMPs constitute permits or authorizations were to be allowed.

For example, with respect to the State's common law claims, Defendants have signaled their intent to argue (1) that AWMPs purportedly permitting or authorizing land application of poultry waste would constitute an "express authority" to land apply poultry waste that would preclude such activity from being deemed a nuisance under 50 Okla. Stat. § 4, (2) that AWMPs purportedly permitting or authorizing land application of poultry waste would be relevant to the fact finder in determining whether such activity were unreasonable under the State's nuisance claims, and (3) that AWMPs purportedly permitting or authorizing land application of poultry waste would be relevant to the fact finder in determining whether such activity were consented to under the State's trespass claim. *See* Response, p. 10. When an AWMP is characterized in a legally correct manner and not as a permit or authorization, as the State seeks in its Motion, however, it is readily apparent that none of these three arguments has merit. State law expressly prohibits pollution and contamination, and thus it is beyond dispute that the State has not consented to the creation of any pollution and contamination.

With respect to the State's 27A Okla. Stat. § 2-6-105 claim, Defendants have signaled their intent to argue that the State's purported permitting or approval of the land application of poultry waste would bear on a finding that poultry waste "is likely" "to cause pollution." *See* Response, p. 9. Again, however, when an AWMP is characterized in a legally correct manner

and not as a permit or authorization and when it is properly recognized that compliance with merely those portions of an AWMP pertaining to land application rates does not equate to full compliance with the Oklahoma law, including the required criteria of best management practices, this argument has no merit.

With respect to the State's RCRA claim, because an endangerment claim stands apart from any state regulatory program, there should be no mention whatsoever of the ORPFOA at all. *See* DKT #2416 & #2585.

Defendants also assert that AWMPs-as-purported-permits-or-authorizations goes to (1) the issue of intent under the State's intentional tort theory, (2) the scope of any injunction to be entered, and (3) the State's motivations for filing this lawsuit. *See* Response, pp. 11-13.

As to their first assertion regarding the issue of intent, Defendants posit that if the land application of the poultry waste were authorized or permitted, no intent to create a nuisance or trespass could be inferred. As an initial matter, this assertion misses the mark on what the State must show under Restatement (Second) of Torts § 825 in order to show "intent."<sup>3</sup> Additionally, and yet again, when an AWMP is characterized in a legally correct manner and not as a permit or authorization, this argument has no traction.

As to their second and third assertions, when an AWMP is characterized in a legally correct manner and not as a permit or authorization, then the injunctive relief sought by the State is entirely complementary to the goals and provisions of the ORPFOA, and Defendants efforts to

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<sup>3</sup> Restatement (Second) of Torts § 825 provides that "[a]n invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor . . . knows that it is resulting or is substantially certain to result from his conduct." The State's evidence is overwhelming that Defendants have known that a nuisance or trespass is resulting or is substantially certain to result from their conduct. *See, e.g.*, DKT #2062 (Facts ¶¶ 47-48). This knowledge exists separate and apart from any knowledge gained under the ORPFOA.

argue that the State as "at war with itself" is revealed for the unfounded, improperly prejudicial assertion that it is.

**E. Because AWMPs are not permits or authorizations, the State need not prove violations of AWMPs**

Defendants have also signaled that they intend to use their legally unfounded assertion that AWMPs are purportedly authorizations or permits to attempt to make the State prove violations of AWMPs. *See* Response, pp. 13-15. Because AWMPs are not authorizations or permits, however, the State need not do so. Rather, the burden falls on Defendants to show their conduct (including the conduct of their growers and any third person to whom poultry waste generated by their birds was transferred) was handled appropriately -- a fact Defendants have conceded they cannot show.

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It is indisputable that as a matter of law an AWMP is neither a permit or authorization to land apply poultry waste generally, nor a permit or authorization for any specific land application rate or instance of poultry waste. Further, as a matter of law, compliance with the land application rates and the like found in an AWMP does not equate to full compliance with Oklahoma law, including the required criteria of best management practices. Yet further, it is indisputable that the State does not promote the land application of poultry waste in the IRW. Therefore, all such assertions are irrelevant. The prejudice and confusion that will befall the State if Defendants are allowed to argue these incorrect propositions before the trier of fact are extraordinary. They should be precluded.

**CONCLUSION**

The State's Motion should be granted.

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I hereby certify that on this 4th day of September, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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